No. 17-1174

In the Supreme Court of the United States

LUIS A. NIEVES AND BRYCE L. WEIGHT,

Petitioners,

v.

RUSSELL P. BARTLETT,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF INSTITUTE FOR JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICUS CURIAE* AND SUMMARY OF ARGUMENT

The Institute for Justice (IJ) is a nonprofit public-interest law firm that litigates in support of greater judicial protection for individual rights, including citizens' First Amendment right to speak about issues of public concern in their communities.[1]

As part of its efforts, IJ works to empower citizens affected by local government policies to become activists for change. IJ has trained thousands of these activists in person, including more than 2,400 property rights activists whose homes or businesses were threatened with blight designations or eminent domain and more than 900 entrepreneurs whose businesses were harmed by regulation. IJ has also worked with more than 150 communities of property owners and entrepreneurs who sought to change local law or oppose harmful proposed projects—including, for example, a group of food truck owners in Sarasota, Florida, fighting an ordinance prohibiting food trucks from operating within 800 feet of a brick-and-mortar restaurant without the owner's consent, and homeowners in a Charlestown, Indiana, neighborhood targeted for redevelopment.

In addition to training activists in person, IJ has assisted countless others by publishing "survival guides" for entrepreneurs and opponents of eminent domain to use in organizing grassroots political cam-

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. The parties have filed blanket consents to the filing of *amicus curiae* briefs with the Clerk.

paigns in their communities. See, *e.g.*, Inst. for Justice, *Entrepreneur's Survival Guide* (Sept. 2014), perma.cc/-PFG5-BK54. These guides instruct activists on how to advocate for change in local government policies.

IJ has a strong interest in ensuring that courts are able to hold governments accountable when they unlawfully arrest individuals in retaliation for exercising their First Amendment rights. The question presented here directly implicates that interest.

A holding that a retaliatory arrest claim is barred when the arrest was supported by probable cause would seriously erode Americans' ability to exercise their First Amendment rights. By foreclosing any judicial inquiry into the motivations behind an arrest—even where there is substantial evidence of a retaliatory motive—a probable cause bar would block a large number of meritorious retaliatory arrest claims. Moreover, by replacing the burden-shifting framework of *Mt. Healthy City School District Bd. of Education* v. *Doyle*, 429 U.S. 274 (1977), with a legal standard far more deferential to the government, the probable cause bar would encourage officials to retaliate through arrests rather than by other means that would remain subject to meaningful First Amendment scrutiny.

Thus, a probable-cause bar would deter citizens from speaking on issues of public concern. It is relatively easy for a person speaking out against government action to be arrested on some charge, and a probable cause bar would ensure that any First Amendment claim based on such an arrest would fail. Faced with the risk of retaliatory arrest and likely deprived of any legal recourse, many citizen activists will avoid public speech and assembly rather than expressing their views—a result that cannot be squared with the values that animate the First Amendment.

ARGUMENT

A. The question presented implicates important First Amendment values.

1. Democracy in America works when, and only when, every American is able to exercise "the prized American privilege to speak one's mind." *Bridges* v. *California*, 314 U.S. 252, 270 (1941). It is crucial that citizens be free not only to vote on Election Day but also to speak on issues of public concern without fear of reprisal.

Citizen speech, as this Court has explained, is essential to democratic governance because it is the mechanism by which public opinion informs government action. The American system presupposes that politicians will be "cognizant of and responsive to [the] concerns" of their constituents; indeed, "[s]uch responsiveness is key to the very concept of self-governance through elected officials." *McCutcheon* v. *FEC*, 572 U.S. 185, 227 (2014). This responsiveness, in turn, depends on maintaining a culture of open and robust public discourse. See *Stromberg* v. *People of State of Cal.*, 283 U.S. 359, 369 (1931) ("The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people * * *, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system."). Public debate on critical issues indicates to elected officials what their constituents expect—and by drawing the public into the political process, it fosters a spirit of civic-mindedness.

Though public debate takes many shapes, there is no more quintessential form of political advocacy than public protests, demonstrations, and assemblies. The First Amendment recognizes the importance of such activities by protecting "the right of the people peace-

ably to assemble" separately from the freedom of speech. U.S. Const. amend. I. And this Court's public-forum doctrine is founded on the understanding that public spaces, "time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague* v. *Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939).

To be sure, as this Court has repeatedly observed, the right to assemble and speak in public "is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order." *Hague*, 307 U.S. at 516. Thus, public speech activities are subject to "reasonable restrictions on [their] time, place, or manner" (*Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989)), and law enforcement is frequently and rightly called upon to enforce those restrictions. But as this Court recently recognized, this policing entails "a risk that some police officers may exploit the arrest power as a means of suppressing speech." *Lozman* v. *City of Riviera Beach, Fla.*, 138 S. Ct. 1945, 1953 (2018). Law enforcement officers may, for example, single out the most vocal people at a protest, or those with particular slogans or signs.

The threat of reprisal from law enforcement may not be a strong deterrent to professional political activists and organizers, but many Americans who engage in public speech activities or attend public assemblies are not professional activists. On the contrary, they are often people who do not generally attend such public events or demonstrations but happen to be passionate about a particular issue or topic. These would-be activists have views that deserve to be heard—whether they pertain to policies at the national level or local government actions likely to impact their individual rights or livelihoods. But such activists are also

particularly susceptible to being deterred from speaking if they believe that they will face arrest for doing so.

B. Barring claims for retaliatory arrest where probable cause exists would severely chill First Amendment activity.

A categorical bar on First Amendment retaliation claims for arrests supported by probable cause would deal a serious blow to First Amendment freedoms. Under that approach, courts would be forbidden from undertaking the same kind of inquiry into the government's motives that they perform without difficulty in other First Amendment retaliation cases. Such an approach would give law enforcement free rein to deal with disfavored speakers through arrests, rather than other measures that would incur meaningful First Amendment scrutiny. This, in turn, would exert a serious chill on activists' protected political speech.

1. A categorical probable-cause bar would prevent courts from identifying the true motive behind government retaliation.

Like many other constitutional doctrines, the First Amendment's protection against government retaliation for individuals' speech implicates courts in the task of determining the motivation for state action. But in First Amendment retaliation cases, courts take a much harder look at governmental intent than they do in other contexts.

In these cases, under the burden-shifting framework of *Mt. Healthy*, 429 U.S. at 287, plaintiffs need only show that their protected First Amendment activity was a "motivating factor" behind government action against them in order to make out a prima facie

case of retaliation. The burden then shifts to the government to show, by a preponderance of the evidence, "that it would have reached the same decision * * * even in the absence of the protected conduct." *Id.* This framework enables courts to hold state actors accountable for retaliation when they act with unlawful motives, while allowing official actions to stand when they would have been taken even absent any retaliation. And as respondent notes, that test has worked well in practice for years. Resp't Br. 42.

Under the approach favored by petitioners, however, no inquiry into governmental intent could ever occur, because a retaliatory arrest claim would be categorically barred as long as probable cause for the arrest existed. Pet'rs Br. 13-16. The result would be to insulate the government actors from liability even where, as here, there is enough evidence to go to a jury on the question whether an arrest was based on a retaliatory motive. Pet. App. 6.

The protection afforded to First Amendment rights should not turn on the method by which the government infringes them—but that is the result of an approach that requires judges and juries to close their eyes to the improper motive behind retaliatory arrests. In circumstances like these, there is no compelling reason to preclude the trier of fact from assessing the motivation for an arrest and to hold the defendant liable if the arrest is found to have been in retaliation for First Amendment activity.

2. *A categorical probable-cause bar would unduly chill First Amendment activity.*

Given that a probable-cause bar would preclude many meritorious claims for retaliatory arrest from going forward (by precluding scrutiny of the motivation

for the arrest), there can be no doubt that the bar would also severely chill First Amendment activity.

To start, this Court has often recognized that governmental retaliation for the exercise of First Amendment rights "'offends the Constitution'" by "'threaten[ing] to inhibit exercise of the protected right.'" *Hartman* v. *Moore*, 547 U.S. 250, 256 (2006) (quoting *Crawford-El* v. *Britton*, 523 U.S. 574, 588 n.10 (1998)); see also, *e.g.*, *Perry* v. *Sinderman*, 408 U.S. 593, 597 (1972) (noting that if the government could take adverse action based on an individuals' First Amendment activity, "his exercise of those freedoms would in effect be penalized and inhibited"). Retaliation puts a person to the intolerable choice of exercising his rights and facing personal jeopardy on the one hand, and refraining from protected speech activities on the other. Faced with that choice, all but the most courageous individuals will refrain from exercising their First Amendment rights—undermining the "uninhibited, robust, and wide-open" debate on public issues that the First Amendment protects above all else. *N.Y. Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964).

Retaliatory *arrest*, moreover, is one of the most fearsome tools for reprisal available to government officials. It is often easy for a police officer or other government actor to find a legal pretext on which to arrest someone whose speech is thought objectionable. For example, the offense for which respondent was arrested—harassment in the second degree—can be committed by "insult[ing], taunt[ing], or challeng[ing] another person in a manner likely to provoke an immediate violent response." Alaska Stat. Ann. § 11.61.120-(a)(1). That vague standard could sweep up virtually any passionate speech uttered in a police officer's presence. And even leaving that statute aside, an officer inclined to retaliate against a person based on

his speech could likely arrest him for jaywalking, loitering, disorderly conduct (Alaska Stat. Ann. § 11.61.110), "[r]efusing to assist a peace officer" (*id.* § 11.56.720(a)), or many other infractions.

And once an arrest is made—even for a trivial offense—the potential consequences are serious:

> A custodial arrest exacts an obvious toll on an individual's liberty and privacy, even when the period of custody is relatively brief. The arrestee is subject to a full search of her person and confiscation of her possessions. * * * The arrestee may be detained for up to 48 hours without having a magistrate determine whether there in fact was probable cause for the arrest. Because people arrested for all types of violent and nonviolent offenses may be housed together awaiting such review, this detention period is potentially dangerous. And once the period of custody is over, the fact of the arrest is a permanent part of the public record.

Atwater v. *City of Lago Vista*, 532 U.S. 318, 364-65 (2001) (O'Connor, J., dissenting) (citations omitted); *id.* at 346 (majority opinion) (acknowledging that, at a minimum, custodial arrests present the opportunity for "gratuitous humiliation[]" of the arrestee). It is self-evident, therefore, that an arrest, accompanied by these collateral consequences, is among the most drastic forms of government retaliation.

It follows that a probable-cause bar will have a profound chilling effect on First Amendment activity. That is so for two reasons. First, as we have shown, by effectively precluding governmental liability for retaliatory arrest as long as probable cause is present, the bar ensures that many instances of unlawful

retaliation will go unredressed. And second, by making it much harder to prove a claim for retaliatory arrest than for other retaliatory conduct, the bar encourages the government to retaliate by way of arrests, rather than other means.

The prospect of reprisal through arrest will surely deter many would-be activists from speaking out on public issues. As explained above, many people who engage in public speech are novices who find the prospect daunting. If they believe that they will be retaliated against if the content of their speech offends the wrong official, these individuals will either censor their political speech or refrain from speaking altogether—to their own detriment and to the detriment of the community that is deprived of hearing their views. The First Amendment cannot abide that result.

This Court's decision last Term in *Lozman* v. *City of Riviera Beach, Florida* is unlikely to be a meaningful check on such abuses. Although *Lozman* held that an individual arrested for speaking out against local government policies could maintain a retaliatory-arrest claim notwithstanding the existence of probable cause for his arrest, the decision relied on the proposition that the facts of that case were "far afield from the typical retaliatory arrest claim." 138 S. Ct. at 1954. Indeed, the Court noted, the petitioner in *Lozman* "allege[d] more governmental action than simply an arrest"; rather, he alleged that he was retaliated against "pursuant to an 'official municipal policy' of intimidation" and that the city government he criticized "formed a premeditated plan to intimidate him." *Ibid.* (quoting *Monell* v. *Dep't of Soc. Servs. of City of N.Y.*, 436 U.S. 658, 691 (1978)). The Court held that, because "[a]n official retaliatory policy is a particularly troubling and potent form of retaliation," there is "a compelling need for adequate avenues of

redress" that justified dispensing with any probable-cause bar. *Ibid.* That "narrow" holding is unlikely to give much protection to individuals who find themselves in less extreme circumstances (*id.* at 1951); only a holding in *this* case affirmatively rejecting a probable-cause bar for all arrests will ensure that those individuals are able to exercise their First Amendment rights in full.

C. Retaliatory arrests are a greater threat to First Amendment activity than retaliatory prosecutions.

In saying all this, we are mindful that the Court, in *Hartman* v. *Moore*, 547 U.S. 250, 265-66 (2006), held that probable cause is a bar to a retaliatory prosecution claim. We agree with respondent that extension of *Hartman*'s rule to the arrest context is unwarranted as a legal matter because *Hartman*'s logic does not apply in the context of retaliatory arrests. See Resp't Br. 34-42. But as a factual matter, too, retaliatory arrests and retaliatory prosecutions are different matters altogether—and extending *Hartman*'s rule to the retaliatory arrest context would pose a far greater threat to protected speech.

The decision whether to prosecute is a weighty one, made after multiple levels of review by multiple officials. A police officer cannot alone make the decision. Instead, a line attorney in the prosecutor's office typically coordinates with the police or other law enforcement officers before making a recommendation to his or her superior. The decision whether to prosecute then ordinarily requires the approval of one or more senior officials before an indictment is filed in the name of the state district attorney or U.S. Attorney or handed up by a grand jury. These layers of review better ensure

that decisions to prosecute are thoughtful and deliberate, and not the product of whim or malice.

By contrast, the decision whether or not to arrest is typically made in the heat of the moment by a single police officer, with little to constrain his or her discretion. Indeed, as we demonstrated above (at 7-8), the grounds for probable cause necessary for a lawful arrest are hardly a safeguard against capricious or abusive conduct—jaywalking, "harassment," and disorderly conduct are enough. And as this Court noted in *Lozman*, the "'presumption of regularity accorded to prosecutorial decisionmaking,'" on which *Hartman* partly relied, "does not apply" to arrests. *Lozman*, 138 S. Ct. at 1953 (quotations omitted).

Arrest is also an easier means of retaliation in light of the difference in the legal standards applied to arrests and prosecutions. An officer need only have probable cause to believe that a crime has been committed to arrest an individual. See, *e.g.*, *Devenpeck* v. *Alford*, 543 U.S. 146, 152 (2004). A decision to prosecute requires more: Under generally accepted principles, a prosecutor should bring criminal charges only if they are supported by probable cause *and* "admissible evidence will be sufficient to support conviction beyond a reasonable doubt." See Standards for Criminal Justice § 3-4.3(a) (ABA 2015). A retaliatory arrest thus may on its face appear lawful, even reasonable, where a retaliatory prosecution would not.

In short, affirming the lower court here has far greater potential to chill First Amendment activity than might have the Court's decision in *Hartman*. That counsels strongly against petitioners' bid to extend *Hartman*'s rule to retaliatory arrests.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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OCTOBER 2018